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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-834

OGDEN CORPORATION, OGDEN MANAGEMENT CORPORATION, OGDEN AMERICAN CORPORATION, LURIA BROTHERS & COMPANY, INC. and WILLIAM J. LURIA,

Petitioners,

v.

LURIA STEEL & TRADING CORPORATION and HYMAN-MICHAELS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OGDEN CORPORATION, OGDEN MANAGEMENT CORPORATION, OGDEN AMERICAN CORPORATION, LURIA BROTHERS & COMPANY, INC. AND WILLIAM J. LURIA,

Petitioners,

v.

LURIA STEEL & TRADING CORPORATION AND HYMAN-MICHAELS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Ogden Corporation, Ogden Management Corporation, Ogden American Corporation, Luria Brothers & Company, Inc. and William J. Luria petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 6, 1973.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 336 F. Supp. 1238 and is set forth in the appendix to this petition at pages 1A to 9A.

The opinion of the United States Court of Appeals for the Third Circuit is not yet officially reported but is reported at Trade Reg. Rep. (1973-2 Trade Cas.) ¶ 74,690 and is set forth in the appendix to this petition at pages 11A to 26A.

JURISDICTION.

The judgment of the court of appeals was dated and entered on September 6, 1973 (27A). This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1) (1970).

QUESTION PRESENTED.

Whether a Federal Trade Commission proceeding under Section 5 of the Federal Trade Commission Act, which is not one of the antitrust laws, is a civil proceeding instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, within the meaning of Section 5(b) of the Clayton Act, that suspends the running of the statute of limitations applicable to a private action for damages under the antitrust laws.[1]

1. Another question arising on the facts of this case is whether a Clayton Act Section 7 Federal Trade Commission proceeding, instituted before the Finality Act of 1959, 15 U. S. C. § 21 (1970), can suspend the running of the statute. The district court ignored this question. We do not present the question in this petition because the court of appeals expressly left it open (15A, 23A) in view of that court's reliance on the theory that a Federal Trade Commission Act proceeding can suspend the running of the statute. We would brief and argue the question if certiorari is granted because the question will remain in the case if this Court concludes that the court of appeals was in error in holding that a Federal Trade Commission Act proceeding can suspend the running of the statute. Other questions decided by the district court and the court of appeals in this case, while important in the context of this particular case, are not of sufficient general importance to merit this Court's consideration.

STATUTE INVOLVED.

The relevant part of Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b) (1970), provides—

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . ."

STATEMENT OF THE CASE.

Plaintiffs brought this action in the United States District Court for the Eastern District of Pennsylvania under the federal antitrust laws to recover damages for a period of almost twenty-two years, begining in January 1948 and extending to October 1969. Plaintiffs alleged that the four-year statute of limitations made applicable to all private damage claims under the antitrust laws by Section 4B of the Clayton Act [15 U. S. C. § 15b (1970)] was suspended by the operation of Section 5(b) of that Act because of the pendency of a Federal Trade Commission proceeding from January 19, 1954 to October 14, 1968.

As more fully explained below, the Federal Trade Commission proceeding relied on by plaintiffs involved charges of unfair methods of competition under Section 5 of the Federal Trade Commission Act [15 U. S. C. § 45 (1970)] and charges of violation of Section 7 of the Clayton Act [15 U. S. C. § 18 (1970)].

The district court held that a Federal Trade Commission proceeding under Section 5 of the Federal Trade Com-

mission Act does not suspend the running of the statute of limitations but that plaintiffs could rely on suspension in this case because the Federal Trade Commission proceeding included allegations that Section 7 of the Clayton Act had been violated.

The court of appeals, although affirming the district court's decision, did so on the ground that a Commission proceeding under Section 5 of the Federal Trade Commission Act will suspend the running of the statute of limitations. Resting its decision on that basis, the court of appeals did not deal with the effect of the Clayton Act allegations.

1. The Federal Trade Commission Proceeding.

The Federal Trade Commission proceeding on which plaintiffs rely to suspend the running of the statute was brought in January 1954 under Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act against Luria Brothers & Company, Inc. and a number of steel mills. The Commission's complaint alleged that Luria was guilty of a number of "unfair methods of competition" in the ferrous scrap business and that Luria's acquisitions of several competitors violated Section 7 of the Clayton Act.

The Commission proceeding resulted in a determination by the Commission that Luria had violated Section 5 of the Federal Trade Commission Act and that one of the challenged acquisitions violated Section 7 of the Clayton Act.[2] The Commission issued a cease and desist order in February 1963. The Court of Appeals for the Third Circuit affirmed the order,[3] sustaining the Commission's broad authority to find unfair methods of competition "not limited

2. **Luria Brothers & Co.**, 62 F. T. C. 243 (1962).

3. **Luria Brothers & Co. v. Federal Trade Comm'n**, 389 F. 2d 847 (3d Cir. 1968).

to practices violative of the Sherman Act, the Clayton Act or the common law."[4] This Court denied certiorari on October 14, 1968.[5]

2. The Case in the District Court.

Plaintiffs, two companies engaged in the ferrous scrap business, commenced this antitrust damage action in the district court on October 10, 1969. Defendants are four affiliated corporations, one of which now operates the Luria business, and an officer of that corporation.[6] Plaintiffs' complaint alleged that defendants, beginning "at least as early as 1946," committed violations of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act affecting the ferrous scrap business.

Defendants moved for partial summary judgment barring all claims for damages that accrued before October 10, 1965, four years before commencement of the action.

In an opinion and order entered January 17, 1972 (1A), the district court (Raymond J. Broderick, *J.*) held that plaintiffs' claims that accrued before January 1, 1952 are barred but in all other respects denied defendants' motion.

Judge Broderick, relying on the Third Circuit's decision in **New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co.**, 332 F. 2d 346 (1964), rejected plaintiffs' argument that proceedings under Section 5 of the Federal Trade Commission Act suspend the running of the statute of limitations (3A).

He then held that a Federal Trade Commission proceeding under Section 7 of the Clayton Act instituted in

4. *Id.* at 859.

5. 393 U. S. 829.

6. For purposes of this petition, we ignore the facts relating to the sale of the Luria business while the Commission proceeding was pending.

1954 was not "a proceeding in equity or criminal prosecution," within the language of the suspension provision as it then existed, so that at the time the Commission's case against Luria began in 1954 the pendency of the case did not suspend the running of the statute (5A).

However, when the 1955 amendments to the Clayton Act became effective in 1956 and changed the language of the suspension provision to "any civil or criminal proceeding," the new language was sufficiently broad to include a Commission proceeding (5A-6A). Thus, Judge Broderick concluded that the running of the statute was suspended on the effective date of the amendments and held that the suspension provision acted to preserve plaintiffs' claims that accrued on and after January 1, 1952, four years before the effective date of the amendment.[7]

Accordingly, Judge Broderick denied defendants' motion for partial summary judgment except with respect to claims that accrued before January 1, 1952 (9A). Thereafter, he amended his order to include a certification for interlocutory appeal under 28 U. S. C. § 1292(b) (10A).

3. The Case in the Court of Appeals.

The Court of Appeals for the Third Circuit granted permission to appeal under 28 U. S. C. § 1292(b).

The court of appeals (Van Dusen, Aldisert and Rosenn, *C. JJ.*), in an opinion by Judge Rosenn, affirmed Judge Broderick's decision, but on wholly different grounds and a diametrically opposite line of reasoning.

The court of appeals held that the distinction it had drawn in **New Jersey Wood** between Clayton Act Section 7

7. Actually, the effective date of the 1955 amendments was January 7, 1956, not January 1, 1956 as Judge Broderick thought. The amendments were enacted on July 7, 1955, and Section 4 of the amending statute provided that it would take effect six months after enactment. 69 Stat. 282 (1955).

proceedings and proceedings under Section 5 of the Federal Trade Commission Act was pertinent only to the scope of the prima facie evidence provision in Section 5(a) of the Clayton Act [15 U. S. C. § 16(a) (1970)] and was, therefore, not determinative in applying the suspension provision in Section 5(b) (19A-20A).

Recognizing that this Court's affirmance in **New Jersey Wood** [381 U. S. 311 (1965)] of the holding that a Clayton Act proceeding will suspend the running of the statute does not require the same result for a proceeding under the Federal Trade Commission Act, the court of appeals chose to follow a Seventh Circuit decision that such a proceeding will do so if it "is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws" (16A-17A).[8]

The court noted that two district courts have reached a similar conclusion,[9] while a third has held to the contrary (17A).[10]

The court further concluded that the running of the statute was suspended as of the date (January 19, 1954) the Commission's proceeding against Luria was instituted but declined to disturb the district court's decision that the suspension did not begin until January 1, 1956 because the plaintiffs had not taken a cross-appeal.

Having thus based its decision on the theory that a Federal Trade Commission Act proceeding can suspend the running of the statute, the court of appeals did not reach the issue of whether the same result could be justified on the ground that the Commission's proceeding against Luria also involved Clayton Act allegations.

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8. **Rader v. Balfour,** 440 F. 2d 469, 473 (7th Cir.), *cert. denied sub nom.* **Alpha Chi Omega v. Rader,** 404 U. S. 983 (1971).

9. **In re Antibiotic Antitrust Actions,** 333 F. Supp. 317, 319-320 (S. D. N. Y. 1971); **Lippa's, Inc. v. Lenox, Inc.,** 305 F. Supp. 182 (D. Vt. 1969).

10. **Laitram Corp. v. Deepsouth Packing Co.,** 279 F. Supp. 883 (E. D. La. 1968).

REASONS FOR GRANTING THE WRIT.

The question presented by the decision below and by this petition is whether a Section 5 Federal Trade Commission proceeding is a "civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws," that will suspend the running of the statute of limitations.

The court of appeals (17A) recognized that the Federal Trade Commission Act is not one of the "antitrust laws" as that term is defined in Section 1 of the Clayton Act [15 U. S. C. § 12 (1970)].[11] Nevertheless, the court of appeals, plainly contrary to its earlier decision in **New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co.**, 332 F. 2d 346 (3d Cir. 1964), *aff'd*, 381 U. S. 311 (1965), held that the Commission's proceeding against Luria, solely because it was under Section 5 of the Federal Trade Commission Act, was a proceeding "to prevent, restrain, or punish violations of . . . the antitrust laws" that suspended the running of the statute of limitations on plaintiffs' claims and thereby converted their suit into a monstrous case covering a span of nearly twenty years.

The court of appeals felt that while this Court's opinion in **New Jersey Wood** is not necessarily controlling (since it decided only that a Commission proceeding under the Clayton Act, which is one of the antitrust laws, suspends the running of the statute), the opinion "sheds light" on the effect of a proceeding under the Federal Trade Commission Act because this Court did not "hint in any way that

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11. The definition includes the Sherman Act [26 Stat. 209 (1890)], parts of the Wilson Tariff Act [28 Stat. 570 (1894), as amended, 37 Stat. 667 (1913)] and the Clayton Act itself. This Court has held that the definition is exclusive. **Nashville Milk Co. v. Carnation Co.**, 355 U. S. 373 (1958).

F. T. C. proceedings under the F. T. C. Act had any different tolling effect than those pursuant to the Clayton Act" (15A-16A).

Of course, there was no reason for this Court to do any hinting in **New Jersey Wood** about a question that was not before it.

What this Court decided in that case was the serious question whether a Federal Trade Commission proceeding under the antitrust laws was intended by the Congress to be within the suspension provision of Section 5(b). Finding nothing in the legislative history of the Clayton Act to indicate a conscious intention either to include or exclude Commission actions (381 U. S. at 320), the Court relied on the Congress's "clearly expressed desire that private parties be permitted the benefits of prior government actions" (*ibid.*) and concluded that it would be inconsistent with this desire to make "enjoyment of these intended benefits turn on the arbitrary allocation of enforcement responsibility between the Department [of Justice] and the Commission" (*ibid.*), both of which have authority to enforce the Clayton Act.

Thus, this Court's precise holding, as the Court itself expressed it, was that "the limitation provision of § 4B is tolled by Commission proceedings to the same extent and in the same circumstances as it is by Justice Department actions" (381 U. S. at 321-322). That this holding does not apply to the question presented here should be obvious from the fact that only the Commission has authority to enforce the Federal Trade Commission Act so that the element of "arbitrary allocation of enforcement responsibility" between the Commission and the Department of Justice that troubled this Court in **New Jersey Wood** is completely absent.

This Court's conclusion in **New Jersey Wood** was not reached without difficulty. Mr. Justice Clark's majority opinion acknowledged that the language of Section 5(b) "does not clearly encompass Commission proceedings" (381 U. S. at 321) even when they are proceedings under the antitrust laws. The decision was by a five-to-two vote, and Mr. Justice Black's dissent, noting that the Solicitor General, appearing amicus curiae, had candidly conceded that the result reached by the Court was "difficult and perhaps impossible to justify in terms of conventional analysis of the text and legislative history" (381 U. S. at 324), argued persuasively for a contrary result.

Under these circumstances, and since only three of the members of the Court who made up the majority in **New Jersey Wood** are still on the Court, one would expect more caution than the court of appeals displayed here in going so far beyond this Court's holding in **New Jersey Wood.**

We need not labor the obvious point that the question presented here is an important question of federal law. That it is a question requiring settlement by this Court is apparent from the variety of decisions in the lower federal courts spawned by **New Jersey Wood.**

The earliest such decision was in **Laitram Corp. v. Deepsouth Packing Co.**, 279 F. Supp. 883 (E. D. La. 1968), where the court held that a Federal Trade Commission proceeding was not a proceeding for violation of one of the antitrust laws and, therefore, could not suspend the running of the statute. The court in that case believed that it was relying on the Third Circuit's decision in **New Jersey Wood** and this Court's affirmance of that decision (279 F. Supp. at 890):

> "The [Court of Appeals for the Third Circuit's] language makes it clear that it did not think that an

> FTC proceeding based only on the FTC Act would have the same result because that would be based on the use of unfair methods of competition or unfair or deceptive acts or practices, not on violation of the antitrust laws . . . ."

Independently, another district court reached the same conclusion, again relying on the court of appeals' decision in **New Jersey Wood: Rader v. Balfour,** [1969] Trade Cas. ¶ 72,709 (N. D. Ill. 1968). On appeal, this conclusion was reversed: 440 F. 2d 269 (7th Cir.), *cert. denied sub nom.* **Alpha Chi Omega v. Rader,** 404 U. S. 983 (1971). The court of appeals read the policy factors relied on by this Court in **New Jersey Wood** as justifying an interpretation extending Section 5(b) of the Clayton Act to include a Federal Trade Commission Act proceeding "if the proceeding is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws" (440 F. 2d at 473).

The Court of Appeals for the Seventh Circuit relied heavily on a district court decision, **Lippa's Inc. v. Lenox, Inc.,** 305 F. Supp. 182 (D. Vt. 1969), which had rejected the reasoning of the district courts in **Rader** and **Laitram.**

The court in **Lippa's** recognized that there would be a serious problem of predictability under the rule urged by the plaintiff there, who contended that the court should analyze the Federal Trade Commission's complaint to ascertain whether the alleged facts amounted to an antitrust violation, in which event the Commission's proceeding would be sufficient to suspend the running of the statute. Rejecting this as "impracticable" (305 F. Supp. at 187), the court sought refuge in Section 5(b)'s language referring to proceedings "to prevent, restrain, or punish violations of any of the antitrust laws"; relying on one of the purposes of the Federal Trade Commission Act—to em-

power the Commission to stop practices which, if allowed to continue, might ripen into antitrust violations—the court equated that purpose of the Act with the purpose of a proceeding under the Act and concluded that, unless a Federal Trade Commission Act proceeding were directed solely at deceptive practices, it could be said to be a proceeding to "prevent" an antitrust violation and, therefore, a proceeding that suspends the running of the statute of limitations.

As part of the same line of reasoning, the **Lippa's** court thought that the "arbitrariness" found by this Court in **New Jersey Wood** is equally present when considering the effect of a Federal Trade Commission Act proceeding because the "Justice Department could well have instituted an action under the Sherman Act to restrain the same violation" (305 F. Supp. at 189)—which is obviously not so.

To the same effect, on similar reasoning, is **In re Antibiotic Antitrust Actions**, 333 F. Supp. 317 (S. D. N. Y. 1971).

The district court in the instant case, however, followed what it believed to be the clear pronouncement of the Court of Appeals for the Third Circuit (in **New Jersey Wood**), distinguishing between Commission proceedings under the Federal Trade Commission Act and those under the Clayton Act—reading the Third Circuit's opinion the same way the district courts in **Laitram** and **Rader** had done.

The assertion by the court of appeals in its opinion here (19A-20A), that its **New Jersey Wood** discussion of the difference between Federal Trade Commission Act and Clayton Act proceedings related only to the prima facie evidence provision in Section 5(a), is not convincing and simply does not square with the statements the court itself made in **New Jersey Wood.**[12]

12. "The Sherman and Clayton Acts . . . are 'antitrust laws' within the meaning of Section 4. Other acts are not, including for our purposes, the Federal Trade Commission Act" (332 F. 2d at 350).

On the other hand, the court of appeals was careful not to adopt the specious reasoning first articulated in the **Lippa's** case and followed by the Seventh Circuit in **Rader** and by the district court in **Antibiotic Antitrust Actions.** It limited itself to citation of those cases and agreement with their result (16A-17A). The determinative consideration was obviously this Court's **New Jersey Wood** decision, which the court of appeals read as indicating that a contrary result would "clearly . . . be in error" (20A). Yet, earlier in its opinion the court had properly recognized that the **New Jersey Wood** holding "does not necessarily control the present case" (15A).

The confusion in the lower federal courts' interpretations of **New Jersey Wood** can be removed only through a definitive decision by this Court. The effect of a Federal Trade Commission Act proceeding on the statute of limitations is an issue that ought to be free from doubt. But it will continue to be in doubt and continue to be litigated until this Court has spoken.

The case at bar presents an ideal vehicle for this Court's consideration of the question presented.

It clearly appears from the decisions in the Commission's proceeding against Luria that the practices attacked under the Federal Trade Commission Act did not amount to violations of the antitrust laws. For example, the Court of Appeals for the Third Circuit, in affirming the Commission's determination that Luria had violated the Federal Trade Commission Act, expressly noted that, "The unfair methods of competition violative of that [Act] are not limited to practices violative of the Sherman Act, the Clayton Act or the common law" (389 F. 2d at 859) and specifically declined to "require proof necessary to show Sherman or Clayton Act violations" (*id.* at 860).

In short, the Commission's proceeding against Luria was not a proceeding against violations of the antitrust laws (except insofar as it was under Section 7 of the Clayton Act) but to "arrest in its incipiency acts and practices which would develop into Sherman Act violations" (389 F. 2d at 860).

We submit that there is serious need for a decision by this Court that such a proceeding is not a "proceeding . . . to prevent, restrain, or punish violations of any of the antitrust laws" within the meaning of the suspension provision of Section 5(b) of the Clayton Act.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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November 27, 1973.

Appendix.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 70-729.

LURIA STEEL & TRADING CORPORATION *et al.*,
Plaintiffs,

v.

OGDEN CORPORATION *et al.*,
Defendants.

OPINION AND ORDER.

(Filed January 13, 1972.)

BRODERICK, *J.*

This matter is before the Court on defendants' motion for partial summary judgment based upon the statute of limitations. Plaintiffs have brought this antitrust suit under Section 4 of the Clayton Act, seeking treble damages by reason of alleged violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, in that plaintiffs, scrap metal dealers, have been injured by the business activities of defendants.

The basic federal statute of limitations applicable specifically to treble damage actions under the antitrust laws is Section 4B of the Clayton Act, which provides that, "claims shall be forever barred unless commenced within

four years after the cause of action accrued." 15 U. S. C. §15b. The parties to this motion have agreed with plaintiffs that this action shall be considered as having been commenced on October 10, 1969. Accordingly, by the present motion defendants seek to bar all claims against them for the period prior to October 10, 1965—(the four-year statutory period).

The principal questions presented by the motion are: (1) whether the running of the statute of limitations should be treated as having been suspended by reason of a Federal Trade Commission proceeding initiated in 1954, which proceeding continued to October 10, 1968, against certain of the named defendants, and (2) if so, against which of the named defendants.

Plaintiffs, in opposing the instant motion, rely on §5(b) of the Clayton Act (15 U. S. C. §16(b)), which provides for the tolling of the four-year statute of limitations during the pendency of "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . and for one year thereafter." They argue that the instant suit was commenced within one year of the termination of the Government action brought by the Federal Trade Commission under §5 of the Federal Trade Commission Act and §7 of the Clayton Act, and, therefore, they have a right to recover for violations of the antitrust law dating back to six years prior to the institution of this suit.[1]

Defendants, on the other hand, argue that the tolling of the statute occurs only during the pendency of the Clayton Act action which was finalized on May 27, 1968, because defendants chose only to appeal the FTC Section 5 decisions

1. Plaintiffs contend that the statute of limitation was tolled in 1954 when there was no federal statute of limitations, and that they are, therefore, entitled to the benefits of the Pennsylvania Statute of Limitations, which ran for six years.

to the United States Supreme Court. Since this occurred more than one year prior to the institution of the instant suit, the defendants contend that all claims except for the four years prior to the institution of this suit are barred. They further argue that in 1954 when the federal action commenced there was no federal statute of limitations or applicable tolling provision and, therefore, plaintiffs cannot rely on the FTC proceeding to toll the statute of limitations.

In this Circuit a distinction has been drawn between a government action under the FTC Act to enforce the provisions of that Act and actions under the FTC Act to restrain Clayton Act violations. *New Jersey Wood Finishing Co. v. Minnesota Mining and Manufacturing Co.*, 332 F. 2d 346, 359 (3rd Cir. 1964), *aff'd*, 381 U. S. 311 (1965). This distinction would appear to indicate that the Third Circuit is of the opinion that FTC actions to enforce FTC violations do not toll the statute of limitations, but that FTC actions to enforce the Clayton Act do. While plaintiffs have cited several cases which hold that governmental action to enforce violations of FTC Act tolls the statute, none of these were decided by the Third Circuit. See, *Rader v. Balfour*, 440 F. 2d 469 (7th Cir.); *cert. denied, sub nom., Alpha Chi Omega v. Rader* (Docket No. 70-285 (1971); *Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182 (D. Vt. 1969); *In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 1971 CCH Trade Cas. ¶73,652 (S. D. N. Y. 1971). While we are impressed with the reasoning expressed in the above three cases, we are constrained to follow the apparent distinction recognized in the *New Jersey Wood* case. However, this distinction is of little significance in the case at bar because, for the reasons hereinafter stated, we reach the same conclusion under both lines of authority.

Since it is clear that the Clayton Act proceedings before the FTC tolled the statute, we must determine whether the Clayton Act aspect of the FTC proceeding in the instant case should be deemed to have been finalized as of the time defendants chose not to appeal the Clayton Act adjudications—i.e., May 28, 1968, (90 days after the date the Third Circuit denied rehearing) or October 14, 1968 (the date the United States Supreme Court denied certiorari).

In deciding this issue of first impression, we rely on the language of the Third Circuit in *New Jersey Wood, supra,* where that Court stated:

> it seems to us that FTC orders and FTC proceedings presently enjoy the efficacy of Court proceedings for purposes of Section 5, and that in this appeal the FTC proceeding . . . to restrain a violation of Clayton Act Section 7, tolled the statute of limitations . . .

We construe this statement to mean that once an FTC proceeding to enforce Clayton Act Section 7 has been instituted, the statute of limitations is tolled until the proceeding is finalized and not merely until the Clayton Act aspects are finalized. Consequently, we hold that the statute of limitations did not cease being tolled until the Supreme Court denied certiorari. This conclusion is reinforced by the admonition of the United States Supreme Court that §5(b) of the Clayton Act should be liberally construed. *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U. S. 311 (1965); *Leh v. General Petroleum Corp.,* 382 U. S. 54 (1965). Any other conclusion would require private plaintiffs to read all motions and papers filed in a government action. It would seem that private plaintiffs should be able to rely on the docket entries in the government's case. In the instant case the pertinent docket entries read as follows:

Notice of filing (on 5/24/68) of petition for writ of certiorari, by Luria Brothers & Co., Inc. received from Clerk of Supreme Court, filed. (S. C. No. 1463, October 1967) (covers 14402, 14411 to 14421 and 14470 to 14472.)

. . .

Certified copy of order (dated October 14, 1968), denying petition for writ of certiorari by Luria Brothers received from Clerk of Supreme Court, filed. (S. C. No. 125, Oct. Term 1968). (Covers 14402, 14411 to 14421 and 14470 to 14472).

Such entries were insufficient to appraise plaintiffs of the termination of the Clayton Act proceedings and failure of the plaintiffs to bring their action within one year of defendants' failure to appeal cannot be held to limit the extent of their claim under a liberal interpretation of Section 5(b). *See, New Jersey v. Morton Salt Co.*, 387 F. 2d 94 (3rd Cir.), *cert. denied*, 391 U. S. 967 (1967).

Having determined that the FTC proceedings tolled the statute of limitations as to the plaintiff's claim, we are presented with the problem of the exact point at which the FTC proceedings commenced the tolling of the statute. Defendants contend that because the law at the time the FTC proceedings began did not provide that an FTC proceeding would toll the statute that the instant FTC proceedings could never toll the statute. This position is wholly without merit. While it is true that prior to the 1955 amendments an FTC proceeding could not toll the statute of limitations, since it is not a "proceeding in equity or criminal prosecution," this in no way bars a pre-1956 (the effective date of the amendments) FTC proceeding from tolling the statute after the amendment adopted in 1955 (effective in 1956) which contained the language "whenever any civil or criminal proceeding is instituted" and "during the pendency thereof" the running of the statute of limita-

tions is tolled. There is nothing in the legislative history or the Act itself which evidences a congressional intent to limit its effect to proceedings instituted after its effective date. However, there is also no suggestion that the statute might be tolled prior to the effective date of the amendment. Consequently, we conclude that the statute was tolled in the instant case on January 1, 1956, the date the 1955 amendments became effective, and that plaintiffs may only recover damages dating from January 1, 1952, if they are successful in the instant suit.[2]

Having concluded that plaintiffs may pursue their claim, dating from January 1, 1952, we must now determine the proper parties defendant. As to the individual defendants, it is asserted that since they are individuals they may not be sued under § 7 of the Clayton Act; and, therefore, an action brought pursuant to the Clayton Act cannot toll the statute as to them. This argument overlooks the views of the Third Circuit as expressed in *New Jersey Wood,* which held that a Clayton Act action tolled the statute as to related Sherman Act violations as well. Since individuals may be sued under the Sherman Act and since the instant complaint alleges violations of the Sherman Act which are closely related to the Clayton Act violations set forth in the FTC proceedings, we hold that the individual plaintiffs [*sic*] are proper parties defendant as to the alleged Sherman Act violations.

As to the corporate defendants, it is argued by defendants that since these corporations (other than L. B. C. Corp. and old Luria Bros.) where not in existence or were not

2. Section 4B of the Clayton Act allows recovery for four years prior to the suspension of the statute of limitations. Plaintiffs' argument that a six-year period should be allowed, since this was the prevalent statute prior to the 1955 amendments setting a federal statute of four years is rejected; since as previously noted it is the 1955 amendment which tolls the statute they should also be bound by the period set forth in the 1955 amendment to the same statute.

engaged in the scrap business at the time of the bringing of the FTC complaint the statute of limitations cannot be tolled as to them.

It is, of course, not essential to the application of § 5(b) that the defendants in a subsequent private suit be named as either defendants or co-conspirators in a prior government suit. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra; State of New Jersey v. Morton Salt Co., supra; Maricopa County v. American Pipe and Construction Co.*, 303 F. Supp. 77 (D. Ariz. 1969). Nor is it essential that conspiracies charged cover identical time periods or be accomplished by identical means. *Leh v. General Petroleum Corp., supra.* All that is required is that the subsequent private suit be based "in part" on the prior government proceeding. 15 U. S. C. § 16(b). As the court said in *Maricopa County, supra,* in holding that the statute was tolled as to two defendants who were neither defendants nor co-conspirators in the prior government case:

> . . . A comparison of the allegations in plaintiff's complaints, here, with the government complaint makes it manifest, however, that the alleged conspiratorial acts of those two defendants were entwined with and fundamentally the same as those of the defendants named in the government actions; with certainty, plaintiff's claims against them are 'based in whole or in part' on the violations alleged in the government actions. Id. at p. 87.

Here, there can be no question but that the instant complaint is based substantially on the 1954 FTC proceeding against Luria Brothers and others, and complains of activities that were carried on in the name of Luria Brothers & Company, Inc. continuously and unabated during a period that started well before the FTC began its action and con-

tinued at least some time after the FTC Cease and Desist Order became final in 1969.

Of the utmost significance here is the fact that from well before the filing of the FTC proceeding through the present time there has continually been a Luria Brothers & Company, Inc. engaged in the ferrous scrap business. It is clear that on October 11, 1955, ownership of Luria Brothers changed hands; however, it is equally clear that the change was one of form rather than substance. Ownership changed, but personnel did not, and allegedly the illegal practices continued. William and Herbert Luria remained as officers of Luria Brothers. Ralph Ablon, then Vice President of Luria Brothers and now Chairman of the Board of Ogden Corp., became President of Luria Brothers. To the world generally and to potential plaintiff competitors of Luria Brothers, the company remained the same.

It is also significant that the "new" Luria Brothers, i.e., the one formed by Ogden to carry on business as before, was formally made a party respondent in the FTC proceeding, was a party to a Stipulation with the FTC staff (which is made a part of the stipulation between counsel), and is currently operating under the final order entered in that proceeding and affirmed by the Court of Appeals for this Circuit. Thus, to potential plaintiffs observing the FTC proceeding, Luria Brothers remained a party respondent throughout the entire period of the FTC proceeding. Therefore, at this state of the proceedings, the change in ownership is not material.

If this Court were to accept defendants' position, the result would be a clear frustration of Congressional intent, for such acceptance would necessarily mean that any defendant in a government antitrust action could unilaterally deprive potential plaintiffs of § 5(b) tolling benefits by

selling its assets to another firm, even though the government proceeding was not terminated. Such a position must be rejected.

The defendants also urge that claims against "old" Luria cannot be asserted against "new" Luria. This, of course, is an issue of liability which must be determined on the merits and has no significance to the instant motion.

Accordingly, for the foregoing reasons the following Order is entered:

ORDER.

AND Now, this 13th day of January 1972, pursuant to defendants' motion for partial summary judgment, it is hereby ORDERED and DECREED that all claims for damages which accrued before January 1, 1952 are barred by the statute of limitations, in all other respects defendants' motion is DENIED.

RAYMOND J. BRODERICK
Raymond J. Broderick, *J.*

ORDER.

(Filed January 31, 1972.)

AND Now, this 31st day of January, 1972, it is ORDERED that the order dated January 13, 1972 is amended by adding thereto the following paragraph:

> "The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation."

RAYMOND J. BRODERICK
Raymond J. Broderick, *J.*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1309.

LURIA STEEL & TRADING CORPORATION *et al.*

v.

OGDEN CORPORATION *et al.*,

Appellants.

OPINION OF THE COURT.

(Filed September 6, 1973, as amended September 21, 1973.)

ROSENN, *Circuit Judge.*

Plaintiffs, scrap metal dealers, brought an anti trust suit under Section 4 of the Clayton Act by which they sought treble damages for alleged violations commencing as early as 1946 of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Defendants sought by a motion for summary judgment to bar all claims for damages accrued before October 10, 1965, due to the running of the statute of limitations. The opinion and order of the United States District Court for the Eastern District of Pennsylvania rejected in general defendants-appellants' motion and barred only damage claims accrued before January 1, 1952. The appeal challenges the district court's disposition of that motion.[1] We affirm.

1. The district court certified on January 31, 1972, that its opinion and order involved a controlling question of law as to which there is substantial ground for difference of opinion. A panel of this court granted permission to appeal this interlocutory order on February 29, 1972. (J. Aldisert dissenting.)

I

Plaintiffs-appellees, Luria Steel & Trading Corporation and Hyman-Michaels Company ("Luria"), filed a complaint in the district court on October 10, 1969, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Sections 3 and 7 of the Clayton Act, 15 U. S. C. §§ 14 and 18. Defendants-appellants, the Ogden Corporation, three of its subsidiaries, and William J. Luria, moved for summary judgment barring all damages accrued more than four years before filing of the suit on the basis of the applicable four year statute of limitations provided by Section 4B of the Clayton Act, 15 U. S. C. § 15b. In opposing the motion, Luria relied on Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b), which suspends the running of the statute during the pendency of "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . and for one year thereafter."[2] Luria contended a Federal Trade Commission (F. T. C.) proceeding, pending from January 19, 1954, to October 14, 1968, suspended the running of the statute on the claims for which suit was begun October 10, 1969.

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2. 15 U. S. C. § 16(b) reads in full:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

The Federal Trade Commission initiated proceedings on January 19, 1954, against scrap metal dealer and broker Luria Brothers & Company [3] for violations of Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, and Section 7 of the Clayton Act, 15 U. S. C. § 18. Two years later Luria Brothers was purchased by the defendant, Ogden Corporation. By stipulation, on March 9, 1956, the purchasing Ogden subsidiary, Luria Brothers & Co., Inc., was added as a respondent to the F. T. C. proceeding. The Commission found violations of F. T. C. Act § 5 and Clayton Act § 7 in 1962, *Luria Brothers and Co.*, 62 F. T. C. 243 (1962); and this court affirmed, *Luria Brothers & Co. v. Federal Trade Commission*, 389 F. 2d 847 (3d Cir. 1968). Luria Brothers was found to have violated F. T. C. Act § 5 by entering agreements with various steel mills which restrained trade and tended to create a monopoly and to have violated Clayton Act § 7 by acquisition of a competitor. 389 F. 2d at 852. Luria Brothers appealed this court's finding of a violation of F. T. C. Act § 5, but not the finding of a violation of Clayton Act § 7. Certiorari was denied on October 14, 1968. 393 U. S. 829 (1968).

The district court opinion in the present case, relying on this court's opinion in *New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co.*, 332 F. 2d 346, 359 (3d Cir. 1964), *aff'd*, 381 U. S. 311 (1965), determined that F. T. C. proceedings to enforce the F. T. C. Act cannot toll the statute of limitations, but F. T. C. proceedings to enforce the Clayton Act may. It therefore found the 1954 F. T. C. proceeding against Luria Brothers, in alleging Clayton Act § 7 violations, tolled the statute of limitations. It further held the statute was tolled until October 14, 1968, the date when certiorari was denied, even though

3. The current appellee in this suit, Luria Steel & Trading Company, is in no way affiliated with Luria Brothers & Company, the corporation investigated by the F. T. C.

only the F. T. C. Act violation was appealed from our decision.[4]

In determining on what date the statute was originally tolled, the district court reasoned that F. T. C. proceedings could not have such an effect until January 1, 1956, the date on which various amendments to Section 5 of the Clayton Act became effective.[5] The court thus barred all claims for damages accrued before January 1, 1952, four years before the statute was tolled. The district court refused to find the statute tolled on any other date for any of the named defendants on the grounds advanced that individuals cannot be sued under the Clayton Act or that the named corporate defendants were not in the scrap metal business when the F. T. C. proceeding began.

Defendants contend that the district court order cannot be sustained, because (1) as held by the district court, F. T. C. proceedings to enforce the F. T. C. Act do not suspend the running of the statute of limitations; and (2) con-

4. Defendants do not challenge the district court's determination that the statute was tolled until certiorari was denied, and not just until May 28, 1968, which was 90 days after filing of the Third Circuit opinion, and thus the final date on which appeal of the Clayton Act finding was possible. The district court reasoned "that once an FTC proceeding to enforce Clayton Act Section 7 has been instituted, the statute of limitations is tolled until the proceeding is finalized and not merely until the Clayton Act aspects are finalized."

5. The 1955 amendment to Clayton Act § 5 actually became effective on January 7, 1956, six months after its July 7, 1955, enactment. 69 Stat. 282 (1955). It changed the language "any suit or proceeding in equity or criminal prosecution" to its prsent form of "any civil or criminal proceeding." The district court reasoned that an F. T. C. proceeding would not have tolled the statute of limitations before the amendment because the proceeding did not conform to the pre-amendment language, but that F. T. C. proceedings did conform to the post-amendment language and thus tolled the statute even for proceedings instituted prior to the amendment's enactment. It, however, held that the statute was not tolled retroactively as of the date the F. T. C. proceeding began; but, rather, that the statute was tolled as of the date the amendment became effective, i.e., January 1, 1956.

trary to the holding of the district court, F. T. C. proceedings begun in 1954 to enforce violations of the Clayton Act could not suspend the running of the statute. In support of the second contention, appellants rely on this court's opinion in *New Jersey Wood, supra,* 332 F. 2d at 348. They note that until 1959, when the Finality Act was passed by Congress, 73 Stat. 243 (1959), 15 U. S. C. § 21, Commission orders based on Clayton Act violations were not enforceable until approved by a court of appeals. They argue that before 1959, F. T. C. proceedings were therefore not "civil or criminal proceeding[s]" which under Section 5(b) of the Clayton Act suspended the running of the statute of limitations. And, they argue that passage of the Finality Act of 1959 did not transform proceedings begun before that time into "civil or criminal proceedings." *Federal Trade Commission v. Jantzen, Inc.,* 386 U. S. 228 (1967).

Plaintiffs contend that the statute was tolled in 1954 on the basis either (1) that F. T. C. proceedings to enforce the F. T. C. Act tolled the statute, or (2) F. T. C. proceedings to enforce the Clayton Act tolled the statute.

II

Consideration of whether the statute of limitations was tolled in 1954 by reason of the F. T. C.'s proceeding to enforce either F. T. C. Act § 5 or Clayton Act § 7 must begin with the Supreme Court's opinion in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U. S. 311 (1965). The holding of *New Jersey Wood* was that an F. T. C. proceeding begun in 1960, alleging violations of Clayton Act § 7, tolled the statute of limitations pursuant to Clayton Act § 5(b). The holding in *New Jersey Wood* does not necessarily control the present case because it did not deal with F. T. C. proceedings brought to enforce violations of the F. T. C. Act, nor did it deal with F. T. C. pro-

ceedings brought to enforce violations of the Clayton Act before 1959, i.e., before passage of the Finality Act.

The Supreme Court opinion, nonetheless, sheds light on the question whether F. T. C. proceedings to enforce the F. T. C. Act can toll the statute. The Court did not hint in any way that F. T. C. proceedings under the F. T. C. Act had any different tolling effect than those pursuant to the Clayton Act. The Court interpreted Clayton § 4B and its tolling provision in light of "the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions." 381 U. S. at 320. In further determining whether the F. T. C. proceedings alleging Clayton § 7 violations in that case tolled the statute for the particular private action involved, the Court found the F. T. C. proceedings had such an effect although the F. T. C. had alleged merely that Minnesota Mining's conduct "*may* substantially lessen competition while the latter [New Jersey Wood] asserts activity that has *actually* done so." Thus, said the Court, Clayton § 4B applies because "[t]hat clause provides for tolling as long as the private claim is based 'in part on any matter complained of' in the government proceedings." 381 U. S. at 323.

In *New Jersey Wood* the Supreme Court, of course, did not have to deal with the explicit claim that an F. T. C. proceeding alleging violations of F. T. C. § 5 can toll the statute. Subsequent cases in other federal courts, however, have squarely faced that issue, and have found the statute may be tolled. The Seventh Circuit held in *Rader v. Balfour*, 440 F. 2d 469, 473 (7th Cir. 1971):

> Although a supportable distinction could be drawn between an FTC proceeding authorized by the antitrust laws to deal with violations thereof and an FTC proceeding for a cease and desist order aimed against alleged conduct which involves either an existing or an

> incipient violation of the antitrust laws but brought under a provision of the FTC act authorizing proceedings against a broader range of conduct, we conclude that the policy factors deemed controlling in *Minnesota Mining* are present and controlling here as well. Therefore, we construe 15 U. S. C. § 16(b) so that an FTC proceeding brought under 15 U. S. C. § 45 [F. T. C. Act § 5] suspends the running of the statute of limitations if the proceeding is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws.

We agree. *Accord In re Antibiotic Antitrust Actions*, 333 F. Supp. 317, 319-20 (S. D. N. Y. 1971); *Lippa's Inc. v. Lenox, Inc.*, 305 F. Supp. 182 (D. Vt. 1969); *contra Laitram Corp. v. Deepsouth Packing Co.*, 279 F. Supp. 883 (E. D. La. 1968).

Defendants argue that this court rejected the reasoning of *Rader* and made a sharp distinction between F. T. C. proceedings to enforce the F. T. C. and Clayton acts in its opinion in *New Jersey Wood*, prior to the appeal to the Supreme Court. In reaching our conclusion in *New Jersey Wood* that F. T. C. proceedings to enforce the Clayton Act do toll the statute, this court noted that Clayton Act § 7 is an "antitrust law," while F. T. C. Act § 5 is not. 332 F. 2d at 350. In further discussing the tolling statute, we emphasized the "affirmative statutory distinction between FTC proceedings under the FTC Act and under the Clayton Act." 332 F. 2d at 359. It was on the basis of these comments that the district court felt constrained[6] to hold that

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6. The district court stated:

> While we are impressed with the reasoning expressed in the above three cases [*Rader, In re Antibiotic*, and *Lippa's*], we are constrained to follow the apparent distinction recognized in the *New Jersey Wood* case.

336 F. Supp. at 1240.

F. T. C. proceedings under the F. T. C. Act could not toll the statute, which speaks in terms of "proceeding[s] . . . to prevent, restrain or punish violations of any of the *anti-trust laws.*" [Emphasis added.] 15 U. S. C. § 16(b).

Our decision in *New Jersey Wood* discusses the distinction between Clayton Act violations and violations of F. T. C. Act § 5:

> Purposefully left broad and generally undefined (as to what constituted an "unfair method of competition" or an "unfair practice"), Section 5 proceeded on the idea of an administrative body of experts (the FTC) which, given a flexible standard of judgment, would discover and prevent use of such practice before it worked a Sherman violation . . . .
>
> Within this area of "unfair methods of competition", the FTC Act and the Clayton Act overlap . . . . These "unfair methods of competition (later amended to include "unfair * * * practices"), whether prohibited specifically under the Clayton Act, or generally under the FTC Act, were to be restrained according to a congressional design.

332 F. 2d at 351-52. In discussing the distinctions between Clayton and F. T. C. Act violations, however, this court was not concerned directly with whether the distinctions provided a basis for holding that F. T. C. proceedings to enforce the F. T. C. Act cannot toll the statute of limitations, while F. T. C. proceedings to enforce the Clayton Act may. We decline to pursue the dicta in *New Jersey Woods* to the conclusion defendants contend it must lead, namely that the distinction between F. T. C. and Clayton violations mandates differing results on the question of whether the statute is tolled.

Our reference in *New Jersey Wood* to the "affirmative statutory distinction" between F. T. C. proceedings to enforce the F. T. C. Act and the Clayton Act was a reference to a statutory distinction which had existed before the Finality Act of 1959 made F. T. C. orders in connection with Clayton Act violations final without court enforcement. This court discussed that distinction in connection with Clayton Act § 5(a), 15 U. S. C. § 16(a), dealing with use of F. T. C. findings of violations as prima facie evidence in private suits. We said that the rule of *Proper v. John Bene and Sons, Inc.*, 259 F. 729 (E. D. N. Y. 1923), that F. T. C. findings of F. T. C. Act violations could not be used as prima facie evidence was not determinative of the issue of whether F. T. C. findings of Clayton Act violations could be so used. We distinguished *Proper* because in 1923 F. T. C. findings were not final nor could they be enforced without judicial action. Thus the findings could not be a "final judgment or decree," which is what Clayton Act § 5(a) requires before the findings can be used as prima facie evidence. By 1964 when *New Jersey Wood* was written, F. T. C. findings of both F. T. C. Act and Clayton Act violations were final and enforceable without court order. Thus, we said cases which continued to follow the *Proper* rule after 1959 failed to recognize the "affirmative statutory distinction" between finality of F. T. C. proceedings under the F. T. C. Act and the Clayton Act, which had existed between 1938 and 1959,[7] and which had been recognized in cases such as *Brunswick-Balke-Collender Co. v. American B. & B. Corp.*, 150 F. 2d 69, 74 (2d Cir. 1945).

Our discussion in *New Jersey Wood* of Clayton Act § 5(a)'s prima facie evidence rule is not applicable to the

7. F. T. C. findings of F. T. C. Act violations were made final by the Wheeler-Lea Act of 1938, 52 Stat. 111 (1938), 15 U. S. C. § 45(g); F. T. C. findings of Clayton Act violations were not made final until the Finality Act of 1959, 73 Stat. 243 (1959), 15 U. S. C. § 21.

question in issue here of whether Clayton Act § 5(b)'s tolling provision applies for F. T. C. proceedings pursuant to the F. T. C. Act. Clayton Act § 5(b), unlike § 5(a), does not speak in terms of "final judgment or decree;" it requires only "civil or criminal proceeding[s] . . . instituted by the United States." As the Supreme Court emphasized in its affirmance of our holding in *New Jersey Wood:*

> § 5(b) tolls the statute of limitations set out in § 4B from the time suit is instituted by the United States regardless of whether a final judgment or decree is ultimately entered . . . .
>
> When we turn to the express language of these two statutory provisions of the congressional policies underlying them, it becomes even more apparent that the applicability of § 5(a) to Federal Trade Commission actions should not control the question whether such proceedings toll the statute of limitations . . . .
>
> This makes § 5(b) readily severable from § 5(a).

381 U. S. at 316-18.

In discussing the "affirmative statutory distinction" between F. T. C. Act and Clayton Act enforcement by the F. T. C. we did not, therefore, mean to imply that the distinction would govern determination of whether F. T. C. enforcement of the F. T. C. Act tolled the statute of limitations under Clayton Act § 5(b). The Supreme Court's affirmance of *New Jersey Wood* indicates clearly that we would be in error to pursue that statutory distinction discussed by us in *New Jersey Wood* to the conclusion suggested by defendants.

III

Having determined that F. T. C. proceedings alleging violations of F. T. C. § 5 may toll the statute of limitations,

the next question is whether the F. T. C.'s 1954 proceedings against Luria Brothers had that effect on the present case. Resolution of that question must be made

> by a comparison of the two complaints. The test is whether the private action is based in part on matters of which the government complained.

Rader v. Balfour, 440 F. 2d 469, 473 (7th Cir. 1971); *cf. Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U. S. 311, 322-24 (1965). We analyzed the first count of the F. T. C. complaint of violations of F. T. C. Act § 5 in our affirmance of the Commission's finding of violations, in *Luria Brothers and Company v. F. T. C.,* 389 F. 2d 847, 852 (3d Cir. 1968), as follows:

> Count I in substance charged that Luria and the other petitioning mills entered into a series of agreements whereby Luria was to act as the exclusive broker for the petitioning mills. It charged that these agreements led to a restraint of trade and tended to create a monopoly in the scrap metal market in violation of Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 45(a)(1). Count I also charged that the petitioning mills conspired to effect a monopoly in Luria, that Luria and others restrained trade in export scrap, that petitioners engaged in coercive tactics, and that Luria acquired various competing companies—all in violation of Section 5.

The present complaint charges Luria with violations of Sherman Act §§ 1 and 2 and Clayton Act §§ 3 and 7 on the basis of the same agreements Luria had with various mills and Luria's same acquisitions of competitors. Since this complaint charges conduct which appears to have been in-

volved in the prior proceeding, the statute was tolled by the F. T. C. proceeding initiated on January 19, 1954. The F. T. C. proceeding was "a civil or criminal proceeding instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws," and the present private action is "based in whole or in part on any matter complained of in said proceeding." 15 U. S. C. § 16(b).

We therefore disagree with the dicta in the district court's opinion that an F. T. C. proceeding pursuant to F. T. C. Act § 5 cannot toll the statute of limitations under Clayton Act § 5(b). The F. T. C. proceedings against Luria Brothers did suspend running of the statute on January 19, 1954.[8] Therefore, as plaintiffs here did institute this action within one year after the completion of the F. T. C. proceeding, they may sue for all damages accrued since January 19, 1950, four years before the statute's running was suspended, in accordance with the four year statute of limitations in Clayton Act § 4B, 15 U. S. C. § 15b.

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8. The district court tolled the statute on the basis of the F. T. C. proceeding for Clayton Act violations. Although the F. T. C. proceeding commenced January 19, 1954, the district court said it could not have tolled the statute until January 1, 1956. *See* footnote 5 *supra*. We find no such infirmity in the F. T. C. proceedings as of January 19, 1954.

In revising Clayton Act § 5 in the 1955 amendment, Congress recognized that the merger of law and equity in the Federal Rules of Civil Procedure in 1938 made anachronistic § 5's reference to "any suit or proceeding in equity;" thus, it amended the language to read "any civil or criminal proceeding." The amendment did not therefore create any substantive change in Clayton Act § 5's characterization of F. T. C. proceedings.

In holding in *New Jersey Wood* that F. T. C. proceedings tolled the statute of limitation, the Supreme Court made no distinction between the post and pre-1956 language. *See* majority opinion, 381 U. S. at 320-21, and dissent, 381 U. S. at 327. The two opinions disagreed, not on the basis of what the 1956 amendment meant, but on construction of legislative history in 1914. Implicit in the majority opinion is the conclusion that an F. T. C. proceeding was not only a "civil proceeding" under the post-1956 statute, but also a "proceeding in equity" under the pre-1956 statute.

Although we find that the statute of limitations should have been tolled on January 19, 1954, rather than January 1, 1956, as the district court held, we do not disturb the judgment of the district court. There was no cross-appeal by plaintiffs, and thus we are bound by the principle of *Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 191-92 (1937), that:

> "Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."

See also Conover v. Montemuro, F. 2d (No. 71-1871, 3d Cir. Opinion of the Court Sur Petition for Rehearing, filed May 8, 1973, concurring opinion of J. Gibbons, slip opinion at 4-6). For the same reason, we need not reach the issue argued by plaintiffs that because the federal statute was not in existence in 1954 the six year statute of limitations of the Commonwealth of Pennsylvania, 12 P. S. § 31, rather than the four year federal limitations, applies. *Chatanooga Foundry & Pipe Works v. City of Atlanta,* 203 U. S. 390 (1906); *Philco Corp. v. Radio Corporation of America,* 186 F. Supp. 155 (E. D. Pa. 1960).

Because we have found that the statute of limitations was tolled by the F. T. C. 1954 proceedings on the basis of the allegations of violations of F. T. C. Act § 5, we need not reach the second issue raised by appellants—whether the statute could also have been tolled by the allegations of Clayton Act § 7 violations.[9]

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9. The F. T. C. Clayton Act § 7 allegation concerned Luria's purchases of competing brokers. This Clayton Act § 7 violation is also alleged in the private suit *sub judice*. We need not reach the

IV

Defendants further urged in their motion for summary judgment and on appeal that even if the statute of limitations were tolled in 1954, it could not have been tolled as to the particular defendants in this case. They argue that the statute could not have been tolled (a) as to individual defendant William Luria because individuals cannot violate Clayton Act § 7, which speaks in terms of what "no corporation" can do, 15 U. S. C. § 18; or (b) as to the four named corporate defendants because none were involved in the scrap metal business in 1954 when F. T. C. proceedings began against Luria Brothers. We find no merit in either of these contentions.

William J. Luria was an officer of Luria Brothers in 1954. He is presently an officer of Luria Brothers & Company, Inc., the Ogden subsidiary which operates the old Luria business. Although Luria, as an individual, could not violate Clayton Act § 7, *Bender v. Hearst Corp.*, 152 F. Supp. 569, 578-79 (D. Conn. 1957), *aff'd* 263 F. 2d 360 (2d Cir. 1959), he could have violated F. T. C. Act § 5 which applies to any person, partnership or corporation. As we have held that the statute was tolled by the Commission's proceedings under the F. T. C. Act § 5, the statute was certainly tolled as to Luria. We express no opinion with regard to whether the statute could have been tolled as to Luria on the basis of Clayton Act proceedings by the F. T. C.

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9. (Cont'd.)

issue of whether F. T. C. proceedings pursuant to the Clayton Act in 1954 could have tolled the statute with regards to this aspect of the private suit, because Luria's purchase of competitors was also alleged by the F. T. C. in 1954 to be an F. T. C. Act § 5 violation. The F. T. C. Act allegation therefore tolled the statute with regards to these acquisitions, whether or not the Clayton Act allegations could have done so independently.

Defendants' argument with respect to the corporate defendants is based on the holding of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U. S. 321 (1971), that the statute may be tolled not only against defendants in the Government proceedings, but also against non-defendants who participated in the allegedly illegal conduct. Defendants argue that it is an obvious corollary to that rule that if a corporation was not even in the business in which wrongdoing occurred when Government proceedings began, it could not have been a participant in the illegal activities. No such obvious corollary exists. This argument ignores the plain statutory language of the tolling provision of Clayton Act § 5(b), which provides for tolling "in respect of every private right of action . . . based in whole or in part on any matter complained of" in the Government proceeding. 15 U. S. C. § 16(b). Plaintiffs have sued Ogden and its three subsidiaries for alleged antitrust violations which are nearly identical with those investigated by the F. T. C. They claim a private right of action against Ogden and its subsidiaries on the basis of their purchase of, and continued operation of, the original Luria Brothers & Company assets subsequent to initiation of F. T. C. proceedings. At this point in the instant litigation, there is no need for us to consider the effects of the stipulation entered into between Ogden and the F. T. C. in 1956 making the new Ogden subsidiary operating Luria's assets a respondent to the F. T. C. proceeding. Whether or not Ogden or its subsidiaries are legally liable for damages either before or after their purchase of Luria, because of the stipulation or more generally because they assumed liability for Luria's actions or continued allegedly illegal actions after the purchase, is an issue of liability yet to be resolved. We express no opinion as to liability of any of

the defendants. All that we hold at the present time is that the statute of limitations was tolled in 1954 because of the F. T. C. proceeding. Issues of liability will be determined upon remand.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 72-1309.

LURIA STEEL & TRADING CORPORATION, *et al.*

v.

OGDEN CORPORATION, *et al.*,

Appellants.

JUDGMENT.

(Filed September 6, 1973.)

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, dated January 13, 1972, as amended by order dated January 31, 1972, be, and the same is hereby affirmed, with costs taxed against appellants.

ATTEST:

THOMAS F. QUINN,

Clerk.

September 6, 1973.